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Union Calendar No. 662

96TH CONGRESS
2D SESSION

H. R. 3486

[Report No. 96-1064]

To limit governmental search and seizure of materials possessed by persons involved in first amendment activities, to provide a remedy for persons aggrieved by violations of the provisions of this Act, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

APRIL 5, 1979

Mr. KASTENMEIER (for himself and Mr. RAILSBACK) introduced the following bill; which was referred to the Committee on the Judiciary

MAY 30, 1980

Additional sponsors: Mr. HUGHES, Mr. FAZIO, and Mr. LLOYD

MAY 30, 1980

Reported with amendments, committed to the Committee of the Whole House on the State of the Union, and ordered to be printed

[Omit the part struck through and insert the part printed in italic]

A BILL

To limit governmental search and seizure of materials possessed by persons involved in first amendment activities, to provide a remedy for persons aggrieved by violations of the provisions of this Act, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That this Act may be cited as the "~~First Amendment~~ *Docu-*
4 *mentary Materials Privacy Protection Act of 1979 1980*".

UNLAWFUL ACTS

5
6 SEC. 2. (a) Notwithstanding any other law, it shall be
7 unlawful for a government officer or employee, in connection
8 with the investigation or prosecution of a criminal offense, to
9 search for or seize any work product materials possessed by a
10 person in connection with a purpose to disseminate to the
11 public a newspaper, book, broadcast, or other similar form of
12 public communication, in or affecting interstate or foreign
13 commerce; but this provision shall not impair or affect the
14 ability of any government officer or employee, pursuant to
15 otherwise applicable law, to search for or seize such materi-
16 als, if—

17 (1) there is probable cause to believe that the
18 person possessing the materials has committed or is
19 committing the criminal offense for which the materials
20 are sought: *Provided, however,* That a government offi-
21 cer or employee may not search for or seize materials
22 described in subsection 2(a) under the provisions of this
23 paragraph if the offense for which the materials are
24 sought consists of the receipt, possession, communica-
25 tion, or withholding of such materials or the informa-

1 tion contained therein (but such a search or seizure
2 may be conducted under the provisions of this para-
3 graph if the offense consists of the receipt, possession,
4 or communication of information relating to the nation-
5 al defense, classified information, or restricted data
6 under 18 U.S.C. 793, 18 U.S.C. 794, 18 U.S.C. 797,
7 18 U.S.C. 798, 42 U.S.C. 2274, 42 U.S.C. 2275, 42
8 U.S.C. 2277, or 50 U.S.C. 783); or

9 (2) there is reason to believe that the immediate
10 seizure of the materials is necessary to prevent the
11 death of or serious bodily injury to a human being.

12 (b) Notwithstanding any other law, it shall be unlawful
13 for a government officer or employee, in connection with the
14 investigation or prosecution of a criminal offense, to search
15 for or seize documentary materials, other than work product,
16 possessed by a person in connection with a purpose to dis-
17 seminate to the public a newspaper, book, broadcast, or other
18 similar form of public communication, in or affecting inter-
19 state or foreign commerce; but this provision shall not impair
20 or affect the ability of any government officer or employee,
21 pursuant to otherwise applicable law, to search for or seize
22 such materials, if—

23 (1) there is probable cause to believe that the
24 person possessing the materials has committed or is
25 committing the criminal offense for which the materials

1 are sought: *Provided, however,* That a government offi-
2 cer or employee may not search for or seize materials
3 described in subsection 2(b) under the provisions of this
4 paragraph if the offense for which the materials are
5 sought consists of the receipt, possession, communica-
6 tion, or withholding of such materials or the informa-
7 tion contained therein (but such a search or seizure
8 may be conducted under the provisions of this para-
9 graph if the offense consists of the receipt, possession,
10 or communication of information relating to the nation-
11 al defense, classified information, or restricted data
12 under 18 U.S.C. 793, 18 U.S.C. 794, 18 U.S.C. 797,
13 18 U.S.C. 798, 42 U.S.C. 2274, 42 U.S.C. 2275, 42
14 U.S.C. 2277, or 50 U.S.C. 783); or

15 (2) there is reason to believe that the immediate
16 seizure of the materials is necessary to prevent the
17 death of or serious bodily injury to a human being; or

18 (3) there is reason to believe that the giving of
19 notice pursuant to a subpoena duces tecum would result
20 in the destruction, alteration, or concealment of the
21 materials; or

22 (4) the materials have not been produced in re-
23 sponse to a court order directing compliance with a
24 subpoena duces tecum, and

1 (A) all appellate remedies have been
2 exhausted; or

3 (B) there is reason to believe that the delay
4 in an investigation or trial occasioned by further
5 proceedings relating to the subpoena would threat-
6 en the interests of justice.

7 In the event a search warrant is sought pursuant to
8 this subparagraph, the person possessing the materials
9 shall be afforded adequate opportunity to submit an af-
10 fidavit setting forth the basis for any contention that
11 the materials sought are not subject to seizure.

12 *SEARCHES OF INNOCENT THIRD PARTIES*

13 *SEC. 3. Notwithstanding any other law, it shall be un-*
14 *lawful for an officer or employee of the United States, in*
15 *connection with the investigation or prosecution of a criminal*
16 *offense, to search for or seize documentary materials pos-*
17 *sessed by a person, unless—*

18 (a) *there is probable cause to believe that the*
19 *person possessing the materials has committed or is*
20 *committing the criminal offense for which the materials*
21 *are sought; or*

22 (b) *there is reason to believe that the immediate*
23 *seizure of the materials is necessary to prevent the*
24 *death of or serious bodily injury to a human being; or*

1 (c) there is reason to believe that the giving of notice
2 pursuant to a subpoena duces tecum would result in
3 the destruction, alteration, or concealment of the mate-
4 rials; or

5 (d) the materials have not been produced in re-
6 sponse to a court order directing compliance with a
7 subpena duces tecum, and

8 (1) all appellate remedies have been exhaust-
9 ed; or

10 (2) there is reason to believe that the delay
11 in an investigation or trial occasioned by further
12 proceedings related to the subpoena would threaten
13 the interests of justice.

14 In the event a search warrant is sought pursuant to
15 this subparagraph, the person possessing the materials
16 shall be afforded adequate opportunity to submit an af-
17 fidavit setting forth the basis for any contention that
18 the materials sought are not subject to seizure.

19 INAPPLICABILITY OF THIS ACT TO SEARCHES AND SEI-
20 ZURES CONDUCTED TO ENFORCE THE CUSTOMS LAWS
21 OF THE UNITED STATES

22 SEC. 3 4. This Act shall not impair or affect the ability
23 of a government officer or employee, pursuant to otherwise
24 applicable law, to conduct searches and seizures at the bor-
25 ders of or at international points of entry into the United

1 States in order to enforce the customs laws of the United
2 States.

3 REMEDIES

4 SEC. 4. (a) A person aggrieved by a search for or sei-
5 zure of materials in violation of this Act shall have a civil
6 cause of action for damages for such search or seizure—

7 (1) against the United States, against a State
8 which has waived its sovereign immunity under the
9 Constitution to a claim for damages resulting from a
10 violation of this Act, or against any other governmen-
11 tal unit, all of which shall be liable for violations of
12 this Act by their officers or employees while acting
13 within the scope or under color of their office or em-
14 ployment;

15 (2) against an officer or employee of a State who
16 has violated this Act while acting within the scope or
17 under color of his office or employment, if such State
18 has not waived its sovereign immunity as provided in
19 paragraph (1). It shall be a complete defense to a civil
20 action brought under this paragraph that the officer or
21 employee had a reasonable good faith belief in the law-
22 fulness of his conduct.

23 (b) The United States, a State, or any other governmen-
24 tal unit, liable for violations of this Act under paragraph
25 4(a)(1), may not assert as a defense to a claim arising under

1 this Act the immunity of the officer or employee whose viola-
2 tion is complained of or his reasonable good faith belief in the
3 lawfulness of his conduct, except that such a defense may be
4 asserted if the violation complained of is that of a judicial
5 officer.

6 (e) The remedy provided by paragraph 4(a)(1) against
7 the United States, a State, or any other governmental unit is
8 exclusive of any other civil action or proceeding for conduct
9 constituting a violation of this Act, against the officer or em-
10 ployee whose violation gave rise to the claim, or against the
11 estate of such officer or employee.

12 (d) A person having a cause of action under this section
13 shall be entitled to recover actual damages but not less than
14 liquidated damages of \$1,000, such punitive damages as may
15 be warranted, and such reasonable attorney's fee and other
16 litigation costs reasonably incurred as the court, in its discre-
17 tion, may award: *Provided, however,* That the United States,
18 a State, or any other governmental unit shall not be liable for
19 interest prior to judgment.

20 (e) The Attorney General may settle a claim for dam-
21 ages brought against the United States under this section,
22 and shall promulgate regulations to provide for the com-
23 mencement of an administrative inquiry following a determi-
24 nation of a violation of this Act by an officer or employee of

1 the United States and for the imposition of administrative
2 sanctions against such officer or employee if warranted.

3 (f) The district courts shall have original jurisdiction of
4 all civil actions arising under this section.

5 *SEC. 5. For violations of this Act by an officer or em-*
6 *ployee of the United States, there shall be a cause of action*
7 *against the United States as provided by section 1346(b) and*
8 *chapter 171 of title 28, United States Code. Remedies*
9 *against the United States provided by this section shall be*
10 *the exclusive remedy or sanction, including the Exclusionary*
11 *Rule.*

12 DEFINITIONS

13 SEC. 5 6. (a) "Documentary materials", as used in this
14 Act, means materials upon which information is recorded,
15 and includes, but is not limited to, written or printed materi-
16 als, photographs, tapes, videotapes, negatives, films, out-
17 takes, and interview files, *but does not mean contraband, the*
18 *fruits of a crime, or things otherwise criminally possessed, or*
19 *property designed or intended for use or which is or has been*
20 *used as the means of committing a criminal offense.*

21 (b) "Work product", as used in this Act, means any
22 documentary materials created by or for a person in connec-
23 tion with his plans, or the plans of the person creating such
24 materials, to communicate to the public, except such work
25 product as constitutes contraband or the fruits or instrumen-

1 ~~talities of a crime~~ *things otherwise criminally possessed, or*
2 *property designed or intended for use or which is or has been*
3 *used as the means of committing a criminal offense.*

4 (c) "Any other governmental unit", as used in this Act,
5 includes the District of Columbia, the Commonwealth of
6 Puerto Rico, any territory or possession of the United States,
7 and any local government, unit of local government, or any
8 unit of State government.

Amend the title so as to read: "A bill to limit govern-
mental search and seizure of documentary materials pos-
sessed by persons, to provide a remedy for persons ag-
grieved by violations of the provisions of this Act, and for
other purposes."

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